a

WOODSVILLE SDN BHD

v.

GILTSPUR HOLDINGS SDN BHD & ORS

b

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL AZIZ MOHAMAD J
[COMPANIES WINDING-UP NO: D2-28-197-1990]
22 MAY 2001

c

COMPANY LAW: *Winding-up - Disposition of property - Purchase of company's assets by member of Committee of Inspection - Leave of court - Principles applicable - Conflict of interest - Whether committee member abused his position - Whether sale was without legal taint and unexceptionable - Rule 144 Companies (Winding-up) Rules 1972*

d

The 2nd and 4th respondents' applied for leave to jointly purchase a property of the 1st respondent company (under liquidation). Leave was required under r. 144 of the Companies (Winding-up) Rules 1972 ('the Rules') as the 2nd respondent was a member of the Committee of Inspection ('COI').

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The property was valued at RM4 million and the liquidators had received two offers. One for RM4 million from Barun Industries (M) Sdn Bhd ('Barun') and the other for RM4.2 million from Perkhidmatan Utama. Perkhidmatan Utama's offer lapsed leaving only Barun's offer but the COI insisted on RM4.2 million. The liquidators entered into a sale and purchase

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agreeement with Barun conditional on the court's approval and informed the COI of their acceptance of Barun's offer on 3 March 2000. On 6 March 2000, the 2nd and 4th respondents made an offer to purchase at RM4,050,000 and the COI requested the liquidators to take note of the new bid. The court rejected the liquidators' application for approval of the

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Barun sale and granted leave to the 2nd and 4th respondents. The petitioner, one of the contributories of the 1st respondent company, in opposing the respondents' leave application contended that: (i) the 2nd respondent had abused his position as he was privy to inside information and based on that, had made an offer which was just RM50,000 higher

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than Barun's offer; (ii) in order for the court to sanction a sale to a member of the COI, the member must have been completely uninvolved and his conduct unexceptionable; and (iii) Perkhidmatan Utama's offer of RM4.2 million was an indication that it was still possible to obtain better offers.

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Held:

[1] There was no abuse by the 2nd respondent of his position as a member of the COI because irrespective of the fact that the timing of the offer might be beneficial to him and the 4th respondent, their offer was not detrimental to the assets of the company. At the time they made their offer, the certified value of the property was RM4 million and the highest offer in existence was Barun's RM4 million. The COI's communication to the liquidators on 6 March 2000 asking them to take note of the offer of the 2nd and 4th respondents was an indication that it found the offer of RM4,050,000 favourable. (p 304 a-c)

[2] The leave granted under r. 144 of the Rules was only to give the 2nd and 4th respondents the capacity to purchase but would not prevent the liquidators from accepting a better offer. (p 304 d)

[3] A member of the COI who wishes to become a purchaser of the company's assets assumes two roles. One as a member of the committee. In that role he is duty-bound to keep the interests of the company at heart. The other is the role of a potential buyer. In that role he is entitled to seek the best deal for himself like any other potential buyer. There is naturally a conflict of interest. In considering leave under r. 144 of the Rules, the important thing is to see that the conflict of interest does not result in anything detrimental to the company where its assets are concerned. In this case it would not. The price offered by the two respondents was the best available in the circumstances. (p 305 b-c)

[4] Whether a particular sale is one that is without legal taint and is unexceptionable or one that is not must depend on the particular circumstances of the sale. In this case, whatever else the 2nd and 4th respondents might have done or not done, they had done nothing to prevent or defeat a better offer, and their offer was the best in the circumstances. There was no legal taint. The 2nd respondent had not taken part in any deliberation of the COI on the sale to him and the 4th respondent. (p 308 a-c)

[Application for leave by 2nd and 4th respondents allowed.]

Case(s) referred to:

Holder v. Holder [1968] 1 All ER 665 ***(refd)***

Liquidators of North British Locomotive Co Ltd v. Lord Advocate [1963] SC 272 ***(refd)***

Legislation referred to:
Companies (Winding-up) Rules 1972, r. 144

Other source(s) referred to:
J O'Donovan, *Law of Company Liquidation*, 3rd edn, p 237
Snell's Equity, 13th edn, pp 282, 283

For the petitioner - Ong Chee Kwan; M/s Lee Ong & Kandiah
For the 2nd & 4th respondents - Teng Chong Moi; M/s Shook Lin & Bok
For the Committee of Inspection - Michael Lim; M/s HK Wong & Partners

Reported by Cindy Chan

JUDGMENT

Abdul Aziz Mohamad J:

The petitioners are appealing against my decision of 21 December 2000 to give leave to the second and fourth respondents to jointly purchase a property of the first respondent company ("the company") having postal address No. 11, Jalan Delima, Kuala Lumpur, at the price of RM4,050,000. The company is in liquidation. The company has six contributories with equal shares. The petitioners are one. Of the others, two are Parquin Sdn Bhd and Milverton Sdn Bhd, which are nominee companies of the second and fourth respondents respectively. The second respondent is also a member of the Committee of Inspection ("COI") of the company. Leave was required on account of the second respondent's being a member of the COI because r. 144 of the Companies (Winding-up) Rules 1972 prohibits a member of the COI to "become purchaser of any part of the company's assets" except by leave of the court.

The liquidators, as part of the liquidation process, had been endeavouring to sell the property. A valuation dated 28 July 1999 had placed the market value at RM4,000,000 on an "as is" basis and RM5,700,000 upon conversion. The liquidators had two offers, one of RM4 million from Barun Industries (M) Sdn Bhd ("Barun"), and another of RM4.2 million from some agency called Perkhidmatan Utama. The latter offer was good up to 29 February 2000. For some reason which it is not necessary to mention, that offer was not accepted by that date, and Perkhidmatan Utama was not willing to extend the date, so the offer lapsed. That left only Barun's offer. The COI's wish was that the property should be sold for RM4.2 million but the liquidators were unsuccessful in persuading Barun to increase their offer. Barun brought forward the date of lapse of their offer from 6 March 2000 to 2 March 2000. The liquidators approached the COI about the position of Barun's offer and on 2 March 2000 the COI communicated to the liquidators their inability to agree to Barun's price of RM4 million, insisting still on RM4.2 million.

Presumably fearing to lose the Barun offer without getting any other better offer, the liquidators on the same day entered into a sale and purchase agreement with Barun which was made conditional on the court's approval. The liquidators informed the COI of their acceptance of the Barun offer on 3 March 2000. On 6 March 2000 the second and fourth respondents made the offer to purchase the property for a cash consideration of RM4,050,000. They paid an earnest deposit of RM83,000. On the same day the COI requested the liquidators to take note of the new bid, by which I gather that they were quite content with the offer.

There followed the application of the second and fourth respondents for leave under r. 144 (encl. (45)) and the liquidators' application for approval of the sale to Barun (encl. (48)), which I heard together. On 21 December 2000 I dismissed the liquidators' application and gave leave to the second and fourth respondents. The petitioners had opposed both the applications. In my judgment I said that I was not in favour of their grounds for opposing the applications and that I would give my reasons should there be an appeal. The written judgment that I delivered then was to explain why, as between the two competing applications, I allowed the application of the second and fourth respondents and dismissed the application of the liquidators and to argue away the fear that had been troubling my mind that my decision might result in no sale should the anticipated sale to the second and fourth respondents not go through, seeing that my decision would result in the aborting of the sale to Barun.

Since only the petitioners have appealed, and the appeal is against the granting of the leave to the second and fourth respondents, I shall deal only with the petitioners' grounds for opposing the leave application of those respondents.

The petitioners said that the requirement for leave under r. 144 is imposed as a safeguard against any abuse by a member of the COI in respect of the assets of the company. They said that leave ought not to be granted because the second respondent had abused his position. The abuse, they argued, lay in making a bid for the property after knowing, from inside information obtained by virtue of being a member of the COI, of the valuation report, of the offer of Perkhidmatan Utama and its subsequent withdrawal, and of Barun's offer. Knowing all that, he and the fourth respondent were able to make an offer which was just RM50,000 higher than the unconverted value of the land and Barun's price and which in the circumstances was the best price, whereas he knew that the COI had insisted on a price of RM4.2 million for the property.

In my judgment, there was no abuse by the second respondent of his position as a member of the COI because, irrespective of the fact that the timing of the offer might be beneficial to him and the fourth respondent, their offer was not detrimental to the assets of the company. At the time they made their offer, the certified value of the property was RM4 million and the highest offer in existence was Barun's RM4 million, Perkhidmatan Utama's offer of RM4.2 million having lapsed. Although initially the COI had insisted on RM4.2 million, there is no proof that the COI, and therefore the second respondent, believed that the true value was RM4.2 million. It could have been simply a stand to get a better price, probably influenced by Perkhidmatan Utama's offer. The COI's communication to the liquidators of 6 March 2000 asking them to take note of the offer of the second and fourth respondents was an indication that they found the offer of RM4,050,000 favourable.

The petitioners argued that Perkhidmatan Utama's offer of RM4.2 million was an indication that it was still possible to obtain better offers. The fact, however, was that no better offers were forthcoming. The leave granted under r. 144 was only to give the second and fourth respondents the capacity to buy but would not prevent the liquidators from accepting a better offer. This is what I said in my earlier judgment:

> The granting of leave to purchase to the second and fourth respondents does not, in my opinion, bring on the liquidators any corresponding obligation to sell to them. Whether the liquidators will sell to the second and fourth respondents, and the terms and conditions on which they would sell to them, are matters for the liquidators' judgment. If a genuine buyer should come along and offer to purchase the property at a price that would bring significantly better returns than the sale to the second and fourth respondents would bring, the liquidators should be free to consider his offer. But unless such an offer comes along, and assuming that the second and fourth respondents' terms of payment are reasonable, it would be reasonable to expect that a sale to them would come about.

In my judgment, there would be an abuse of position if the offer of the second and fourth respondents was prejudicial to the company where their assets were concerned. It was not in the circumstances. The fact that, with knowledge of what had been going on, those respondents had to go only RM50,000 higher than Barun's offer to be the highest bidder was irrelevant. If at all anyone should be aggrieved at that, it was Barun, but Barun's grievance, if at all they were aggrieved, was not relevant. The inside knowledge, by itself, was not an abuse because the second respondent would obtain it as a matter of course by virtue of his position as a member

of the COI. The offer of the two respondents was in effect more favourable than Barun's by RM122,000 because the sale to Barun would have involved a deduction of RM72,000 agency fees.

A member of a committee of inspection who wishes to become a purchaser of the company's assets assumes two roles. One is that of a member of the committee. In that role he is dutybound to keep the interests of the company at heart. The other is the role of potential buyer. In that role he is entitled to want the best deal for himself like any other potential buyer. There is naturally a conflict of interest. In considering leave under r. 144, in my judgment the important thing is to see that the conflict of interest would not result in anything detrimental to the company where its assets are concerned. In this case it would not. The price offered by the two respondents was the best available in the circumstances. As submitted by their counsel, there would be abuse of position if they, for instance, bid at lower than RM4 million or persuaded the other members of the COI and the liquidators to accept their bid.

The fact that they could convert the land so that it could fetch a value of RM5,700,000 is a neutral factor, being a natural gain from the purchase, something that any other purchaser would benefit from the purchase.

Several authorities were cited by learned counsel for the petitioners, but they are of no assistance or are distinguishable.

Snell's Equity, 13th edn, at pp. 282 and 283, merely lays down that "a purchase of trust property by a trustee is voidable at the instance of any beneficiary", no matter how beneficial it may be to the trust estate, but there are exceptions to the rule, one of which is that the court has power to sanction a sale. What would be helpful to know is what are the matters that the court should take into consideration in giving sanction, but that is not dealt with in those passages.

The same may be said of the *Law of Company Liquidation* by JO' Donovan, 3rd edn, which at p. 237 teaches that a sale of any liquidation asset to a member of the committee of inspection could be open to challenge, so that the court's approval is necessary, but does not lay down the matters that should be considered in granting approval.

Holder v. Holder [1968] 1 All ER 665 was a case where, on a challenge by a beneficiary, the Court of Appeal found that in the special circumstances of the case the rule of equity by which a trustee's purchase of the trust property might be avoided did not apply. It is difficult to see for what purpose the case was cited. Maybe it was to apply the special

circumstances in that case, which was a case of purchase by an executor of estate property, to this case by way of analogy. But application by analogy is seldom safe. Each case must be considered according to its own merits and circumstances.

In *Liquidators of North British Locomotive Co. Ltd. v. Lord Advocate* [1963] SC 272, a Scottish case, the liquidators of a company in a creditor's voluntary liquidation proposed to sell part of the assets of the company to the Board of Trade, which was represented on the committee of inspection. In Scotland there was no provision, such as we have in r. 144, enabling a member of the committee of inspection to become purchaser of an asset of the company with the leave of the court, and prohibiting the purchase unless with leave. The liquidators in that ease, although having statutory power to sell the assets of the company to any person, feared that because the sale was to a member of the committee of inspection, who was in a position of trust, doubts might arise as to the validity of the sale. So they sought the court's leave under the general statutory provision that enabled liquidators to apply to the court to determine questions. Two questions required to be answered. One was whether the application was necessary, the Lord Advocate maintaining that it was not, because the liquidators had statutory power to sell. The other was whether approval should be given.

On the first question, it was decided that the application for approval was appropriate because, even though the liquidators had power to sell, the sale might be challengeable as a sale to a person in a position of trust. The reason is given at p. 277. The learned judge thought that a sale to a member of the committee of inspection is not necessarily and inevitably illegal because there are instances where a sale to a trustee may not, in certain circumstances, be open to successful challenge. He then cited the instance of the sale to the Board of Trade as one that might not be open to successful challenge, but concluded nevertheless that the safe course would be to apply for sanction of the sale. I quote the crucial passage:

> While the committee has no specific duty to approve or disapprove of the sale that is proposed, and while there is no specific obligation on liquidators to obtain their advice or consent before selling by private bargain any of the assets in the liquidation, I am of opinion that the members of a committee of inspection are so far clothed with the character of trustees that a sale to any one of them of any of the liquidation assets could be open to challenge by a party with title and interest to do so. I do not suggest that such a transaction is necessarily and inevitably illegal. A creditor-purchaser is, in my opinion, in the same position as a trustee who is also a beneficiary on the trust estate, and, in such cases, transactions with the trust may not, in certain circumstances, be open to successful challenge:

> cf. *Perston v. Perston's Trustees* [1863] 1 Macph. 245, per Lord Justice – Clerk Inglis at p. 254. This passage is quoted also in *Menzies on Trustees*, par. 467. And there also have been cases where trustees have been held entitled themselves to purchase with consent of the beneficiary, e.g., when all attempts to find a purchaser otherwise have failed. In my opinion, therefore, even when the Board of Trade is represented on the committee of inspection as a trustee for other creditor-beneficiaries, in the exercise of its powers and in performance of the duties, through its representative, of a member of a committee of inspection, there may be circumstances in which, its representative having stood aside from the deliberation on a proposed sale of a trust asset, a sale to the Board of Trade of an asset in the liquidation could be held to be without legal taint and unexceptionable: but, as at present advised, I doubt whether it would be safe for a liquidator in the position of the petitioners to assume that, as matter of law, such a sale would be without risk of challenge so far as the purchasers are concerned.

That passage was cited by the petitioners' counsel to argue that for the court to sanction a sale to a member of a committee of inspection under r. 144, the member must have been completely uninvolved and his conduct unexceptionable and the sale must be without legal taint. That submission was made in reference to the circumstances that I have mentioned earlier about the second and fourth respondents that were relied on to argue that leave should not be granted.

It seems to me that that part of the passage that speaks of a sale to the Board of Trade is part of the citing of the instances where a sale to a person in the position of a trustee, as the Board of Trade was, may not be open to a successful challenge, but nevertheless it would be prudent to take the safe course of obtaining the prior sanction of the court. The learned judge was there hypothesizing a sale that had taken place and was being challenged. He was not looking at the actual position of the case in hand and deciding on whether the sale should be authorised. That he was to do later. The hypothesis was that – should a sale had been done and should it be challenged – "there may be circumstances in which, its representative having stood aside from the deliberation on a proposed sale of a trust asset, a sale to the Board of Trade of an asset in the liquidation could be held to be without legal taint and unexceptionable". The phrases "there may be circumstances", "deliberation on a proposed sale of a trust asset" and "could be held to be" are all indicative of a hypothesis. Of course, even though it was a hypothesis, the passage might imply that for a proposed sale to be authorised the sale must be "without legal taint and unexceptionable" and one of the requirements for it to be so is that the member of the committee of inspection must have stood aside from the

deliberation on the proposed sale, which must mean deliberation on the proposed sale to the member. While the principle of a sale having to be without legal taint and unexceptionable may be the correct principle, whether a particular sale is one that is without legal taint and unexceptionable or one that is not must depend on the particular circumstances of the sale. In this case, whatever else the second and fourth respondents might have done or not done, they had done nothing to prevent or defeat a better offer, and their offer was the best in the circumstances. There was no legal taint. The second respondent had not taken part in any deliberation of the COI on the sale to him and the fourth respondent. I could not see for what palpable reason the sale to them could be said not to be unexceptionable.

To return to the Scottish case, it is at p. 278 that the second question was answered. The learned judge decided to authorise the liquidators to sell to the Board of Trade. The considerations that influenced the decision are stated in the following passage:

> The proposals for sale are supported by skilled advice, although no actual test of the market appears to have been made. It is, however, averred that no other possible purchaser exists who could or would be prepared to take over the subjects on the basis of a going concern. It is not denied that it was only the Board of Trade that showed any interest in the subjects under consideration. The committee of inspection, other than the representative of the Board of Trade, have apparently unanimously approved the proposed sale. These circumstances are such that it appears to me that the proposals are the best that can be devised so as to secure as much for the creditors of the company as may be got from the realisation of these assets. Obviously, it is in their interests that the assets which are here to be disposed of should be sold as nearly on the basis of a going concern as is possible.

In the end it came down to what was best economically for the liquidation. That was what, as it clearly appeared to me, the sale to the second and the fourth respondents here would be in the circumstances.